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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Jason Fritch, Individually and on Behalf of  
10 All Others Similarly Situated,

11 Plaintiff,

12 v.

13 Orion Manufactured Housing Specialists,  
14 Inc., an Arizona company; and L. James  
Miller, an Arizona resident,

15 Defendants.

16 No. CV-21-00509-TUC-JGZ (JR)

17 **REPORT AND  
18 RECOMMENDATION**

19 **I. Background**

20 Pending before the Court is Plaintiff's Motion for Conditional Certification (Doc.  
21 12). The Plaintiff in this action, Jason Fritch, alleges that he was a non-exempt full-time  
22 employee who worked for Defendants in 2020 and 2021. He alleges that Defendants Orion  
23 Manufactured Housing Specialists, Inc. and L. James Miller ("Defendants" when referred  
24 to collectively) created a scheme where they would pay 40 hours on a regular paycheck  
25 with applicable taxes taken out and then, for any hours worked over 40, would pay  
26 employees in cash at their regular pay rate.

27 On December 8, 2021, Plaintiff brought the pending action in which he alleges  
28 Defendants actions violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219.  
On January 18, 2022, Plaintiff filed the pending motion requesting conditional certification  
of a collective action pursuant to 29 U.S.C. § 216(b) of the FLSA consisting of:

1 All person who work[ed] for Defendant Orion Manufactured Housing  
 2 Specialists, Inc., and/or L. James Miller; who work[ed] over 40 hours in any  
 3 given workweek as a past or present worker, and who only received straight  
 4 time for all hours worked over 40 in a given workweek.

5 *Motion* (Doc. 12), p. 1. In addition to seeking conditional certification of the class, Plaintiff  
 6 has also submitted a proposed Notice of Collective Action Lawsuit Against Defendants  
 7 Orion Manufactured Housing Specialist, Inc., and L. James Miller (hereinafter "Proposed  
 8 Notice") that is intended to give notice to potential opt-in plaintiffs. *Id.*, pp. 7-10; Ex. 2.

9 In response, Defendants agree to Plaintiff's request for conditional class  
 10 certification. However, Defendants object to portions of the Proposed Notice, contending  
 11 that: (1) the Court's neutrality should be stated at the top of the notice; (2) both Defendants'  
 12 names should be used throughout the notice; (3) the "ATTN:" statement is misleading and  
 13 grammatically incorrect; (4) Section III of the notice contains language that should be  
 14 stricken as unresponsive to the question presented; (5) notice by email is inappropriate; (6)  
 15 posting the notice and inclusion of the notice in Defendants' workers' paychecks is  
 16 unnecessary; (7) Defendant should not be required to disclose former employees' personal  
 17 phone numbers and social security numbers; (8) potential opt-in plaintiffs should be told  
 18 that they have a right not to join the lawsuit; and (9) Section VIII of the Proposed Notice  
 19 should be deleted. *Response* (Doc. 24), pp. 2-6. In reply, Plaintiff states he has no objection  
 20 to many of Defendants' proposals, but argues against others. *Reply* (Doc. 25), pp. 1-5. Each  
 21 is addressed below.

22 **II. Discussion**

23 **A. The Court's neutrality should be stated at the top of the notice**

24 Defendants suggest the shaded box on page 1 of the Proposed Notice contain the  
 25 following language:

26 The United States District Court for the District of Arizona expresses  
 27 not opinion as to the merits of this lawsuit for overtime compensation. This  
 28 is a Court-authorized notice and is not a solicitation from a lawyer.

*Response*, p. 2. The Plaintiff has no objection. *Reply*, p. 1. The Court therefore recommends  
 29 Defendants' language be included in the Proposed Notice.

1           **B. Both Defendants' names should be used throughout the notice**

2           Defendants request that, to avoid confusion, they not be referred to collectively as  
 3 "Orion" in the Proposed Notice, but that the notice refer to them as "Orion and Mr. Miller."  
 4 *Response*, pp. 2-3. Plaintiff agrees to the request so long as the Defendants are identified  
 5 as "Orion and/or L. James Miller." *Reply*, pp. 1-2. Although the contours of liability are  
 6 not entirely clear, the Ninth Circuit has recognized "[t]hat the overwhelming weight of  
 7 authority is that a corporate officer with operational control of a corporation's covered  
 8 enterprise is an employer along with the corporation, jointly and severally liable under the  
 9 FLSA for unpaid wages." *Boucher v. Shaw*, 572 F.3d 1087, 1094 (9th Cir. 2009)). Because  
 10 Defendants are potentially jointly and severally liable under the FLSA, Plaintiff's request  
 11 is appropriate. The Court therefore recommends that the Proposed Notice refer to  
 12 Defendants as "Orion and/or L. James Miller."

13           **C. The "ATTN:" statement is misleading and grammatically incorrect**

14           Defendants contend that the "ATTN:" statement at the beginning of the Proposed  
 15 Notice could be read as commanding the recipients to return the consent. As such, they  
 16 propose that the statement read: "IF YOU WISH TO PARTICIPATE IN THIS ACTION,  
 17 YOU MUST RETURN THE ENCLOSED 'CONSENT TO BECOME A PARTY  
 18 PLAINTIFF' FORM BY TBD." *Response*, p. 3. Plaintiff does not object to Defendants'  
 19 proposal and the Court recommends that the "ATTN:" statement be amended.

20           **D. Section III of the notice contains language that should be stricken**

21           Defendants contend that everything after the first paragraph of Section III, which is  
 22 titled "Why Did I Receive This Notice?," is unrelated to the question asked or redundant  
 23 of information provided in Section VII. Plaintiff has no objection to the change and the  
 24 Court recommends that the material following the first paragraph of Section III be removed  
 25 from the Proposed Notice.

26           **E. Notice by email is inappropriate**

27           Defendants object to Plaintiff's request to contact potential opt-in plaintiffs by email  
 28 because Defendants do not have email addresses for the potential opt-in plaintiffs and

1 because email notice is inappropriate. *Response*, p. 3. However, as in *Scales v. Information*  
 2 *Strategy Design Inc.*, 356 F.Supp.3d 881 (D. Ariz. 2018), the Court finds no reason to limit  
 3 notice to only first-class mail. As Plaintiff notes, Defendants' employees are manual  
 4 laborers and it is reasonable to believe that some of them might be transient individuals  
 5 who might best be contacted via email. As Plaintiff points out, under similar circumstances,  
 6 the Eastern District of California offered the following:

7       Recently the Ninth Circuit held a single mailed notice, along with the  
 8 placement of information posters in the buildings where employees worked,  
 9 was not the best practicable under the circumstances, finding “it particularly  
 10 problematic that, despite concerns that former employees in particular might  
 11 be difficult to reach by mail, the settlement provided no other means of  
 12 reaching former employees,” and “when at least 12% of the mailed notices  
 13 were ultimately determined to be undeliverable—meaning those class  
 14 members had not received notice—still no additional means of notice  
 15 reasonably calculated to reach those class members was attempted.” *Roes* [,  
 16 *I-2 v. SFBSC Mgmt., LLC*], 944 F.3d [1035] at 1046 [(9th Cir. 2019)]. In  
 17 *Roes*, the class members were former and current employees in adult  
 18 entertainment clubs, and “[a]lthough the mailed notice was supplemented  
 19 with posters that were hung in the defendant night clubs, those posters were  
 20 likely to be seen only by class members who were still working at the  
 21 nightclubs, and those class members are also the precise group of people for  
 22 whom the defendants likely had a current address such that mail notice could  
 23 successfully be effected.” *Id.* Further, “[a]s to those former employees for  
 24 whom the claims administrator was able to identify a valid address, the lack  
 25 of reminder notices is particularly relevant, given that the posters would  
 26 serve no function.” *Id.* at 1047. The Ninth Circuit held that “[i]n sum, the  
 27 notice process was not ‘reasonably calculated, under all the circumstances,’  
 28 to apprise all class members of the proposed settlement, because the  
 ‘circumstances’ included the district court’s and parties’ belief that class  
 members were ‘transient’ and thus might be difficult to reach by mail, and  
 the posters also were not reasonably calculated to reach all of the absent class  
 members who could not be notified by mail or to serve as a reminder to those  
 who did receive the single mailed notice.” *Id.*

25       *Beltran v. Olam Spices and Vegetables, Inc.*, No. 1:18-cv-01676-NONE-SAB, 2021 WL  
 26 2284465 at \*21 (E.D. Cal. June 4, 2021). Many of the concerns raised in *Beltran* apply  
 27 with equal force here. Many of Defendants' former employees may be difficult to reach by  
 28 mail and supplementing notice via email is therefore reasonably calculated to reach class

1 members who otherwise might not receive notice. The Court therefore recommends that  
2 notice by email be permitted.

3 **F. Posting the notice and inclusion in workers' paychecks is unnecessary**

4 Defendants contend that notice via first-class mail is sufficient and that "[t]here is  
5 no reason current employees should also receive notice via posting and/or in their  
6 paychecks." The Court partially agrees. By posting notice at the workplace, current  
7 employees who are potential opt-in plaintiffs are more likely to receive notice. However,  
8 the inclusion of notice with the paychecks of every current employee is likely overbroad.  
9 Presumably, many current employees are not potential opt-in plaintiffs. The Court also  
10 agrees that such notice would likely lead current employees who are not potential opt-in  
11 plaintiffs to believe Defendants are guilty of wrongdoing in relation to their wages,  
12 something that has not been alleged. Thus, as Defendants contend, providing notice in  
13 paychecks would be inappropriate. Additionally, home and email addresses for any current  
14 employees are likely known and any potential opt-in plaintiffs who are also current  
15 employees will get notice via those avenues rendering inclusion in paychecks unnecessary.  
16 As such, the Court recommends that notice be posted at the workplace, but that Defendants  
17 not be required to provide notice in the paychecks of current employees.

18 **G. Defendant should not be required to disclose former employees'  
personal phone numbers and social security numbers**

19 Defendants contend that Plaintiff's request for phone numbers and social security  
20 numbers of potential opt-in plaintiffs amounts to an unnecessary violation of privacy.  
21 Plaintiff has no objection to the non-disclosure of social security numbers, but explains that  
22 the telephone numbers would be for counsel's eyes only and would be used for the sole  
23 purpose of finding email and mailing addresses. The use of the telephone numbers as  
24 described by Plaintiff would aid in identifying potential opt-in plaintiffs and in avoiding  
25 directing notice to individuals who might share a name with a potential opt-in plaintiff, but  
26 who is not in that category. Thus, the Court recommends that Defendants provide telephone  
27 numbers for prospective opt-in plaintiffs. The Court further recommends the entry of a  
28 protective order limiting the use of the telephone numbers to the purpose described by

1 Plaintiff.

2 **H. Potential opt-in plaintiffs should be told they have a right not to join  
the lawsuit**

3 Defendants request that Section VII of the Proposed Notice be amended to include  
4 a statement that recipient of the lawsuit have the right not to join the lawsuit. This appears  
5 to be a standard course of action, *see Kuzich v. HomeStreet Bank*, No. CV-17-02902-PHX-  
6 GMS, 2018 WL 3872191 (D. Ariz. Aug. 15, 2018), and Plaintiff has no objection to the  
7 inclusion of such a statement.

8 **I. Section VIII of the Proposed Notice should be deleted**

9 Defendant contends that the Proposed Notice's Section VIII instruction to potential  
10 opt-in plaintiffs to contact Plaintiff's counsel for more information should be deleted.  
11 Plaintiff has no objection and the Court therefore recommends that the section in question  
12 be deleted.

13 **III. Recommendation**

14 Based on the foregoing, the Magistrate Judge RECOMMENDS that the District  
15 Court, after its independent review, GRANT IN PART and DENY IN PART Plaintiff's  
16 Motion for Conditional Certification (Doc. 12). Specifically, the Magistrate Judge  
17 recommends that the class be conditionally certified and that the Proposed Notice be  
18 amended as described above.

19 This Recommendation is not an order that is immediately appealable to the Ninth  
20 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of  
21 Appellate Procedure, should not be filed until entry of the District Court's judgment.

22 However, the parties shall have fourteen days from the date of service of a copy of  
23 this recommendation within which to file specific written objections with the District  
24 Court. See 28 U.S.C. § 636(b)(1) and Rules 72(b), 6(a) and 6(e) of the Federal Rules of  
25 Civil Procedure. Thereafter, the parties have fourteen days within which to file a response  
26 to the objections. Replies shall not be filed without first obtaining leave to do so from the  
27 District Court. If any objections are filed, this action should be designated case number:  
28 CV 21-00509-TUC-JGZ. Failure to timely file objections to any factual or legal

1 determination of the Magistrate Judge may be considered a waiver of a party's right to de  
2 novo consideration of the issues. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121  
3 (9th Cir. 2003) (en banc).

4 Dated this 27th day of April, 2022.

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Honorable Jacqueline M. Rateau  
United States Magistrate Judge

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